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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-826

FAIRFAX HOSPITAL ASSOCIATION, *et al.*,
Petitioners,

v.

CITY OF FAIRFAX, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY OF PETITIONERS TO RESPONDENTS' MEMORANDUM OPPOSING CERTIORARI

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REPLY OF PETITIONERS TO RESPONDENTS' MEMORANDUM OPPOSING CERTIORARI

I. The Court of Appeals Did Not Find That the Facts Are in Dispute.

In their memorandum opposing *certiorari*, plaintiffs assert that the Court of Appeals reversed the District Court because disputed issues of fact made summary judgment improper. This contention is patently erroneous. In reversing the District Court on the state action issue, the Court of Appeals disagreed with the legal standard employed by the District Court and thus remanded to the District Court for *further* factual findings

under the different *legal standard* established by the Court of Appeals. *See* App. 10a, 562 F.2d at 285 (Wyzanski, J.); App. 11a, 562 F.2d at 286 (Widener, J.). The Court of Appeals expressly recognized that the basic facts of this case are not in dispute, stating that "all parties took the position that . . . the issue . . . of state action [was] ripe for summary judgment." (App. 2a, 562 F.2d at 282). This comports with the express finding of the District Court that "[e]ach party agrees there are no disputed facts and that the matter is ripe for decision." (App. 27a). *See also* App. 17a, 562 F.2d at 288-89 (Hall, J., dissenting).

It is apparent that the question of whether further factual findings are necessary is dependent upon whether the Court of Appeals applied the correct legal standard. In granting summary judgment on the basis of the undisputed facts set forth in the Petition, the District Court explicitly applied the legal standard established by the Court of Appeals for the Third Circuit in *Duke & Co., Inc.* v. *Foerster*, 521 F.2d 1277 (3d Cir. 1975). (App. 33a). This standard was later accepted by the Court of Appeals for the Fifth Circuit in *City of Lafayette, La.* v. *Louisiana Power & Light Co.*, 532 F.2d 431 (5th Cir. 1976), *cert. granted*, 430 U.S. 944 (1977) (Docket No. 76-864), and the Court of Appeals for the Seventh Circuit in *Kurek* v. *Pleasure Driveway & Park District of Peoria*, 557 F.2d 580 (7th Cir. 1977) (petition pending, Docket No. 77-440).[1]

[1] Plaintiffs argue that *certiorari* should not be granted because the Court of Appeals remanded the case for further proceedings. Plaintiffs ignore the fact that review of a non-final judgment was granted in *Lafayette* and that such review is appropriate where, as here, "there was a conflict on a question of law with another court of appeals . . . which would justify review of a final decree or judgment." R. Stern, E. Gressman, *Supreme Court Practice* § 4.19 at 181 (1969). Indeed, review is especially appropriate here since a decision by this Court in *Lafayette* may very well dispose of this case. (*Id.* at 180).

In reversing, the Court of Appeals rejected the legal standard employed by the District Court and the Third, Fifth and Seventh Circuits, and held that under the state-action doctrine, there is little or no difference between the acts of a municipality and the conduct of a private party. (Petition at 15-18). If this Court upholds the reasoning adopted by the Fifth Circuit in *Lafayette*, the court below must be reversed since the undisputed facts of this case establish that the challenged leasing by defendant IDA "promote[s] the health and welfare of the inhabitants of the Commonwealth" of Virginia in accordance with the "intent of the legislature" and "the policy of the Commonwealth." Industrial Development and Revenue Bond Act, Va. Code § 15.1-1375 (Supp. 1977).[2] (App. 43a).

II. *Certiorari* Must Be Granted If the District Court Is to Apply a Decision by this Court in *Lafayette*.

As plaintiffs note, if *certiorari* is denied this case will go to trial. Plaintiffs ignore the fact that such a trial will be unnecessary if the Court of Appeals erred in rejecting the legal standard of *Duke & Co., Lafayette*

[2] Section 15.1-1375 of the Industrial Development and Revenue Bond Act sets forth the purposes of the Act and states in pertinent part:

> It is the further *intent of the legislature and shall be the policy of the Commonwealth* to grant to industrial development authorities the powers contained herein with respect to medical facilities . . . to the end that such authorities may protect and promote the health and welfare of the inhabitants of the Commonwealth *by assisting in the acquisition*, construction, equipping, expansion, enlargement and improvement of medical facilities . . . *in order to provide modern and efficient medical services to the inhabitants of the Commonwealth* . . . and to vest such authorities with all powers that may be necessary to enable them to accomplish such purposes, which powers shall be exercised for the benefit of the inhabitants of the Commonwealth and for the promotion of their health and welfare. *It is not intended hereby that any such authority shall itself be authorized to operate any such medical facility* . . . . (Emphasis supplied). (App. 43a).

and *Kurek* applied by the District Court. Moreover, in suggesting that denial of *certiorari* is proper because the District Court could be guided by a decision in *Lafayette*, plaintiffs fail to realize that unless this Court grants *certiorari* the District Court is bound by the mandate of the Court of Appeals. *See Lawlor* v. *National Screen Service Corp.*, 352 U.S. 992 (1957); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). In view of the pending decision in *Lafayette*, the Court should adhere to its established practice and grant *certiorari* and either set the case down for argument or summarily decide the case after a decision in *Lafayette*. *See* R. Stern, E. Gressman, *Supreme Court Practice* § 4.17 at 178 (1969).

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Petition, a writ of *certiorari* should issue.

Respectfully submitted,

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